

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Jerry Brandner
Brandner Oil Co
732 E Taylor St
Medford WI 54451

PECFA Claim #54451-1513-17
Hearing #03-142

FINAL DECISION

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed August 22, 2003, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on November 17, 2003, at 201 West Washington Street, Madison, Wisconsin.

The issue for determination is whether the Department's decision dated 7/28/03 was correct with regard to the items identified in Petitioner's Appeal filed on 8/22/03.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Jerry Brandner
Brandner Oil Co
732 E Taylor St
Medford WI 54451

(By Telephone)

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838

Madison WI 53707-7838

By: Joseph R. Thomas
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

(In person)

The authority to issue a decision in this matter has been delegated to the undersigned by order of the Secretary dated October 23, 2003. The matter now being ready for decision, I hereby issue the following:

FINDINGS OF FACT

By decision dated July 7, 2003 the Department of Commerce (the "Department") denied reimbursement for certain costs submitted by the Petitioner alleging they were incurred because of the presence of chlorinated compounds existing on the Petitioner's site. Neither party disputes that the costs associated with the clean-up of chlorinated compounds are not eligible for PECFA reimbursement.

The Department denied these costs based on a methodology letter received from Fisher Environmental ("Fisher"), the Petitioner's initial consultant¹, on February 6, 2001. In this letter Fisher indicated that because chlorinated compounds were present on the site, an even sharing of certain costs, including the installation of piezometer, between the Department and the Petitioner was proposed. By letter dated March 26, 2001, the Department notified Fisher of its approval of Fisher's proposed methodology. The Department sent a copy of this letter to the Petitioner. In its

¹ At some point in time, Fisher Environment ceased acting as consultant for the Petitioner and Northern Environmental assumed this role.

letter to Fisher, the Department reserved the right to modify Fisher's proposed methodology and determine reimbursement calculations according to any future modifications.

The Petitioner appealed the Department's denial of reimbursement objecting to the Department's claim that because non-eligible substances existed on his property, he was obligated to share in certain remedial costs associated with the installation of a piezometer and certain drilling expenses. Specifically, the Petitioner appeals the Department's denial of \$1,272.50 plus the interest associated with this amount stating that these costs would have been incurred regardless of whether the chlorinated substances existed on his property.

DISCUSSION AND CONCLUSIONS OF LAW

Chapt Comm 47.30(4) states:

Only the costs associated with the eligible products may be claimed. Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their entirety.... Any costs required because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product.

To support its position, Northern Environmental, on behalf of the Petitioner submitted information indicating that little if any costs were incurred because of the existence of non-eligible compounds. According to lab results, of the total amount of contaminants on the property, 94% reflect petroleum compounds, while 6% reflect contamination for chlorinated compounds. The Petitioner argues that the cost of the installation of the piezometer would have remained the same with or without the presence of the chlorinated substances.

Conversely, the Department argues that its claims adjuster reasonably relied on Fisher's methodology, which proposed an equal sharing of the costs of the piezometer due to a co-mingled

plume. According to its submissions, the Department does not focus on whether any costs were actually incurred because of the existence of the chlorinated products, but instead alleges that because the Petitioner did not voice any objection to Fisher's methodology prior to receiving its "Breakdown of PECFA Costs," letter and reimbursement check, the Petitioner is precluded from appealing the Department's denial of reimbursement. The Department argues that any recourse the Petitioner has should be against Fisher Environmental directly.

When the Petitioner was put on notice of Fisher's proposed methodology by copy of a letter that a Department hydrogeologist sent to Fischer Environmental, in this same letter, the Department hydrogeologist states:

The Department may re-evaluate the methodology during claim review
or at any other time additional information becomes available.
Final determination of eligibility will be made at claim review time.

According to this letter, the Department reserved a right to change its decision-making relative to Fisher's proposed methodology presumably in anticipation of the possibility that later information would be indicative of a more accurate allocation of clean-up costs. In light of the Department's carved out reservation of right to modify, the Petitioner should be offered the same opportunity. More importantly the Department's argument essentially implies that the Petitioner's right to appeal the Department's approval of Fisher's methodology terminated at what can only be considered a certain undefined point, given that the Department could have changed this methodology at any time prior to its final claim determination.

Chapt Comm §47.53(1)(a) provides that a responsible party may request a hearing with the Department on any provision or decision made within the scope of the PECFA program. The Department's automatic preclusion of the Petitioner's appeal right is not included in any PECFA

regulation or state statutory provision and was not communicated to the Petitioner prior to the Department's final determination of eligibility. The Petitioner filed a timely appeal and the Department has not provided evidence that indicates its final determination of eligibility made at claim review time, based on Fischer's methodology, is a decision falling outside the scope of Chapt Comm §47.53(1)(a)'s appellate procedures.

D E C I S I O N

The Department's decision dated 7/28/03 was incorrect with regard to the items identified in Petitioner's Appeal filed on 8/22/03. The Department shall reimburse the Petitioner for costs that would have been incurred regardless of whether chlorinated substances were present on the Petitioner's site. Any cost required specifically because of the presence of the chlorinated compounds, the Petitioner shall pay. In the event an exact allocation amount cannot be determined, the costs shall be allocated 94% to eligible compounds and 6% for ineligible compounds, with the Department reimbursing the former.

Dated: _____

Mari A. Samaras-White
Administrative Law Judge
Department of Commerce
PO Box 7970
Madison WI 53707-7970

copies to:

Jerry Brandner
Brandner Oil Co
732 E Taylor St
Medford WI 54451

Joseph R. Thomas
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

REQUEST FOR REHEARING/JUDICIAL REVIEW

Hearing #03-142
Commerce # 54451-1513-17

Request for New Hearing

Petitions for new hearings must be received no later than 20 days after the mailing date of this hearing decision.

If, after you receive the decision, you believe it was based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. **To ask for a new hearing**, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Your request must explain why you believe the hearing examiner's decision is wrong. If you have new evidence to submit, you must describe your new evidence and explain why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or on the discovery of new evidence which could not have previously been obtained through due diligence on your part, your request will be denied.

The petition for new hearing must also be sent or faxed to all other parties named in this decision as "PARTIES IN INTEREST." **Late requests cannot be granted.** The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on all other parties named as "PARTIES IN INTEREST". **Late requests cannot be granted.** The process for judicial review is described in Sec. 227.53 of the statutes.

PARTIES IN INTEREST:

Jerry Brandner
Brandner Oil Co
732 E Taylor St
Medford WI 54451

Joseph R. Thomas
Assistant Legal Counsel
Office of the Secretary
Department of Commerce
201 W. Washington Ave.
Madison, WI 53707-7838

Date Mailed: _____

Mailed By: _____